APPENDIX A

F I L E D
FEB 12, 1982

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BRUG, Plaintiff-Appellant, v. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant-Appellee.	NO. 80-4321 D.C. No. C-76-2682 WAI OPINION

Appeal from the United States District Court for the Northern District of California
The Honorable Richard M. Bilby, Presiding Argued and Submitted December 15, 1981

Before: CHOY and HUG, Circuit Judges, and GRAY*, District Judge.

HUG, Circuit Judge:

This is an action by a clerical employee of a union claiming pension benefits for disability retirement. She became a beneficiary of the Pension Plan under an amendment, adopted by the Trustees of the plan, effective June 1, 1975. The amendment and implementing regulations included certain clerical workers as beneficiaries. In March 1976 the Trustees rescinded the amendment and the regulations. Prior to the rescission of the amendment and regulations she became disabled and made application

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* The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

for disability retirement, for which she was eligible at the time. The Trustees delayed action on her application until after the rescission of the amendment and then denied her benefits on the basis that she was not an employee covered by the plan. The district court upheld the action of the Trustees and entered judgment against the plaintiff. The issue is whether the rescission of the amendment could be applied retroactively so as to exclude the plaintiff as a covered employee. We hold that it could not, and that the action of the Trustees was arbitrary and capricious in not applying the terms of the Pension Plan in effect at the time that she applied for the pension benefits for

which she was eligible. We therefore reverse the judgment of the district court.

I

FACTS

The Carpenters Pension Trust Fund for Northern California is a jointly administered employee benefit trust created by a Trust Agreement executed in 1957 by various contractors' associations and the district councils and locals of the Carpenters Union. The Trust Agreement initially provided for pension benefits for the employees of the contractors who were required to make contributions pursuant to collective bargaining agreements with the Carpenters Union. Effective in 1965 the local unions, the district councils, and other labor organizations

affiliated with the Carpenters Union were also permitted to make contributions to the pension fund for their employees.

The Trust Agreement and the Pension Plan adopted pursuant to the Trust Agreement both contained an identical provision defining an employee covered by the Pension Plan. The provision states:

> The term "Employee" means any employee of an Individual Employer who performs one or more hours of work covered by any of the Collective Bargaining Agreements. The term "Employee" shall also include employees of Local Unions and District Councils on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of said employees is not a violation of any existing law or regulation.

Nothing in the Trust Agreement or the Pension Plan limits the categories or classifications of union employees for whom pension contributions may be made.

Article II of the Pension Plan provides:

> All Employees of Local Unions and District Councils on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees are also eligible to participate in the benefits provided under the Pension Plan.

Pursuant to the foregoing provisions of the Trust Agreement and Pension Plan, officers and business agents of the Carpenters Union have had pension contributions made to the Pension Plan on their behalf since 1965. Prior to June 1, 1975, however, local unions and district councils

were not required to contribute to the Pension Trust Fund on behalf of their office clerical employees.

In 1974, following an audit, the Internal Revenue Service advised the Trustees that contributions to the Pension Plan by certain local unions and district councils failed to comply with the coverage requirements of the Internal Revenue Code and discriminated in favor of highly compensated officers and business agents and against office clericals employed by the Union.

As a result of this warning from the IRS, the Trustees considered amending the Pension Plan to require the inclusion of clerical employees of any local union or district council

that made contributions for its officers and non-clerical employees. The Trustees were advised by their attorneys that clerical employees should be included because the IRS report suggested that the disparity between retirement benefits received by the union clericals and the benefits received by the union officers and business agents could affect the tax-exempt status of the pension fund. The Trustees were informed by their financial consultants and actuaries that the financial impact of including the clerical employees of the unions in the Pension Plan was minimal and that such inclusion would not result in placing a burden on the retirement

benefits payable to members of the Carpenters Union.[1/]

After several months of discussion, the Trustees adopted Amendment 13 and implementing regulations on August 26, 1975, the effect of which was to require the union employers who desired to continue participating in the plan to make contributions for all full-time employees, including the clerical employees as well as the union officials and business agents. The "contribution date" for the clerical employees was established as June 1, 1975. Earlier contribution dates had been previously established for other employees covered by the Pension Plan. The significance of the "contribution date" under the plan is that employers were required to contribute for hours

worked by their employees after that date. The covered employee received what was defined as "future service" credit for periods of employment after the contribution date and also received "past service" credit for periods of employment with the participating employers before the contribution date.[2/] The clerical workers were thus entitled to "past service" credit for periods of employment with the Union prior to June 1, 1975.[3/]

A newsletter was sent by the Trustees to all of the local unions, district councils and the State Council of Carpenters, advising them that if they wished to contribute to the Pension Plan for any of their employees, they would be required to contribute

for all full-time employees.

Between September 1975 and January 1976, five clerical employees applied for, and were granted, pensions pursuant to Amendment 13. In November, 1975, Brug, a clerical employee of Local No. 22, who was suffering from health problems, contacted the Pension Services Department of the Union and inquired about her eligibility for an early retirement pension. Local No. 22 had made contributions for all its employees, including clerical employees, as required by Amendment 13. Michael Pierce, the Supervisor of the Pension Services Department, informed Brug that at age 63 she was not eligible for normal retirement and that her 12 years and 7 months of past service was not sufficient to establish

eligibility for an early retirement pension. However, she was told that because of her health problems she could qualify for a disability retirement pension if she were to qualify for Social Security disability benefits.[4/]

Brug made the application with the Social Security Administration and in February, 1975 was informed that she had been awarded the Social Security disability benefits. She then applied for a disability retirement pension. Brug's application was reviewed by the Pension Services Department, which determined that she satisfied all of the eligibility criteria. The Pension Services Department then forwarded Brug's

application to the Trustees' Pension Approval Committee (the "Committee") with a recommendation that the application be approved. Ordinarily, the Committee follows the recommendation of the Pension Services Department in voting to approve or reject pension applications. The minutes of the Committee meeting are subsequently presented to the full Board of Trustees for their adoption. Accordingly, Pierce informed Brug that the approval of her application was automatic.

Brug's application came before the Committee on March 16, 1976. Instead of automatically approving the application however, the Committee, aware of some recent complaints from carpenters about the granting of

pension benefits to the clerical employees of the unions, deferred consideration of Brug's request until the full Board of Trustees had had a chance to reconsider the propriety of Amendment 13. The Board of Trustees called a special meeting on March 23, 1976 and voted to rescind the amendment, to accept no further contributions to the pension fund on behalf of the unions' clerical employees, and to refund all contributions that had already been made on their behalf. The Committee then reconvened and voted to deny Brug's application.

II

STANDARD OF REVIEW

The Trustees' actions in administering the pension fund are subject

to the fiduciary standard set forth in ERISA. Section 404 (a)(1) of ERISA provides, in part, that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> > (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . .

29 U.S.C. § 1104(a)(1).

This court has held that under ERISA and under the Labor-Management Relations Act the trustees' decision may be reversed only when it is arbitrary or capricious. Gordon v. ILWV-PMA Benefit Funds, 616 F.2d 433, 438 (9th Cir. 1980); Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976);

Danti v. Lewis, 312 F.2d 345, 348 (D.C. Cir. 1962). In Rehmar we stated:

> Where ... the instrument defining the fiduciaries' duties gives them broad discretion, as is generally the case with welfare and pension trusts, the courts limit their review and intervene in the fiduciaries' decisions only where "they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run."

555 F.2d at 1371, quoting Kosty v. Lewis, 319 F.2d 744, 747 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964). The critical inquiry, then, is whether the denial of Brug's pension application due to the rescission of Amendment 13 and the implementing regulations was an arbitrary or capricious action.

III

DISCUSSION

The district court, in concluding that the Trustees did not act arbitrarily or capriciously, stated:

> If the defendant Fund had the power to rescind Amendment Thirteen, then plaintiff's claim must fail as any pension she might receive had to be approved by the Board of Trustees. While Mr. Pierce's office has approved the plaintiff's application, it did so acting under the provisions of Amendment Thirteen. Once that Amendment was rescinded there was no basis for his office to approve such an application. Furthermore, that approval did not vest any right in the plaintiff. Only the Board of Trustees have that power and it was never exercised in plaintiff's behalf.

There is no question that Brug met the eligibility requirements for the disability pension at the time she retired and applied for the pension.[5/]

There is also no doubt that under Amendment 13 and the implementing regulations she was an employee who was covered by the Pension Plan. It is clear that Brug's disability had been established, that she retired, and that she filed her pension application all before the date that Amendment 13 and the implementing regulations were rescinded. The question, therefore, is whether the Trustees, during the pendency of Brug's application, could retroactively amend the plan so as to disqualify her as a beneficiary.

This process of pulling the rug out from under Brug violates the terms of the Pension Plan itself. Article X, Section 1 of the Pension Plan's Rules and Regulations provides:

> Amendment. The Board of Trustees may amend or modify this Pension Plan at any time or from time to time in accordance with the Trust Agreement, except that no amendment or modification may reduce any benefits payable to Employees who retired prior to such amendment or modification so long as funds are available for payment of such benefits. . . . (emphasis added.)

The appellee does not contend that Amendment 13 violated ERISA or any other statutory requirement or federal regulation. Appellee asserts that the Amendment to the plan was unlawful because it was in violation of the basic Trust Agreement, for the reason that it had never been intended by the Trustors that the clerical employees of the unions would be covered. This argument is not persuasive in light of the Trust

Agreement provision in Article I, Section 4, which defines the employees who are covered, stating:

> The term "Employee" shall also include employees of Local Unions and District Councils, and employees of labor councils of other labor organizations with which a Local Union or District Council is affililated, on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of any said employees is not a violation of any existing law or regulation.

The provision is clear and unambiguous. There is no contention that the inclusion of the clerical employees violated any existing law or regulation, and thus the action of the Trustees in providing for the inclusion of clerical employees, for whom contributions were to be made by

employing union organization, was well within their discretion.

Following the adoption of Amendment 13 and the implementing regulations, there had been complaints and threats of suit by carpenters who contended that the action was unfair because it allowed pensions for the clerical workers to be computed on the basis of service rendered prior to the date the contributions for service were made by the employing union organization. However, this was a discretionary matter for the Trustees. The Pension Plan provided for pension credit for service before the designated contribution date for other employees as well. It is the nature of a pension plan such as this one to provide

benefits for periods of service for which no contributions are specifically made or required. This plan provided such benefits, including death benefits, disability pensions, credit for past service, credit for service in the armed forces, and partial pensions based on credited service with other related plans. This type of benefit has to be based upon actuarial probabilities, not specific contributions for specific employees.

The Trustees had the discretionary authority under the terms of the Trust Agreement to include the clerical employees. They also had the authority to terminate the clerical employees' inclusion in the plan.[6/] However, the Trustees did not have the

discretionary authority to apply that termination so as to preclude Brug's eligibility for pension benefits that had vested in the meantime.

In Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962), and Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974), the District of Columbia Circuit considered a question similar to the one presented here. In Danti v. Lewis, the employee met all eligibility requirements for a pension at the time he filed his application. The trustees, however, denied the application because it failed to comply with an amendment that had been adopted after the application was filed. The court found that the trustees' action was arbitrary and capricious, concluding

that the application should have been reviewed under the eligibility standards in effect at the time it was submitted by the employee.

In Kiser v. Huge, former mine workers brought a class action against the trustees of the United Mine Workers Retirement Fund, alleging that the denial of their pension benefits on the basis of a resolution passed after they submitted applications was arbitrary and capricious. The court agreed, stating that "the pension benefits of members of the plaintiff class began accruing on the dates when their applications should have been approved by the Trustees. . . ." 517 F.2d at 1247 (emphasis in original). Relying on Danti, the

court concluded that "pension rights vest at the date a retired miner applies for benefits, if the applicant meets all eligibility criteria then in effect." Id.

The appellee argues that Danti and Kiser are distinguishable because they involved retroactive application of eligibility rules, whereas this case was a retroactive exclusion of beneficiaries from the plan. In our view, this is a distinction without a difference. The rule stated in Danti and Kiser is equally applicable whether the trustees use newly-adopted eligibility criteria as the basis for denying benefits or accomplish the same goal by simply eliminating a class or employees from the list of

plan beneficiaries.

This court, in a different but analogous situation held in Burroughs v. Board of Trustees of Pension Trust, etc., 542 F.2d 1128 (9th Cir. 1976), cert. denied, 429 U.S. 1096 (1977), that the trustees had acted arbitrarily and capriciously in retroactively applying a break-in-employment rule to the plaintiff who had no notice of its existence and, thus, no reasonable opportunity to protect himself from its impact during the years to which it was retroactively applied. The court stated that in determining whether trustees act arbitrarily and capriciously the question is "not ... what the eligibility requirements for the pension are, but rather ...

how the changes in qualifications are made." 542 F.2d at 1131. Thus, the arbitrary and capricious action in Burroughs was not the adoption of the break-in-employment rule. It was, rather, the application of that rule to an employee who, in applying for a pension, relied upon his eligibility under plan provisions that he thought were still in effect.

Under the Pension Plan in existence at the time of her disability retirement, Brug met all of the eligibility requirements. The fact that the Trustees did not formally pass upon the matter until after Amendment 13 was rescinded can have no effect upon her entitlement.

The judgment of the distrct court is REMANDED for entry of judgment consistent with this opinion.

FOOTNOTES

1/ Page 9 There were between 70 to 80 clerical employees employed by the union that would potentially be entitled to benefits under the amendment. There were between 40,000 to 50,000 carpenters working under collective bargaining agreements who were covered by the plan and approximately 5000 employers who contributed to it.

2/ Page 10 "Past service" credit was also given under the terms of the plan for certain military service and time spent as a prisoner of war. "Future service" credit was also given for certain periods when the employee was not actually working for a participating employer due to service in armed forces and periods of disability during which workman's compensation benefits were paid.

3/ Page 10 The major significance of the distinction between "past service" credit and "future service" credit is that in order to qualify for normal or early retirement the employee was required to have 15 years of combined service credit, either "past" or "future" or have only

10 years of "future service" credit. However, for disability retirement, such as Brug applied for, no such distinction was made, and only 10 years of service whether "past" or "future" was required.

4/ Page 12 Article III, Section 9 of the Pension Plan provided that "the Board shall accept as sole proof of total disability a determination by the Social Security Administration that the Employee is entitled to a Social Security Disability Benefit in connection with his Old-Age, Survivors and Disability Insurance coverage.

5/ Page 17 Article III, Section 7 of the Pension Plan provided:

> Disability Pension. An Employee shall be entitled to retire on a Disability Pension if he is totally disabled at a time when:
>
> a. He has not yet attained age 65;
> b. He has at least 10 years of Pension Credit (Past and Future Service Credit) without a break in employment as defined in Article IV, Section 6; and
> c. he has actually worked in Covered Employment for at least 350 hours in the

12-month period following his Contribution Date, or for 700 hours after his Contribution Date.

Brug was 63 years of age, had over 10 years of pension credit and had worked in covered employment at least 350 hours in the 12-month period following the contribution date. She had established her total disability by obtaining Social Security disability benefits.

6/ Page 22 Any question whether the exclusion of the clerical employees of the union might jeopardize the qualification of the plan under ERISA, as suggested in the IRS audit, is not before us.

APPENDIX B

F I L E D

JUN 9 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARY BRUG, an individual, Plaintiff, vs. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant.	No. C-76-2682 WAI ORDER

This case involves a suit under 29 U.S.C. §1132(a)(1)(B) (ERISA) by a former clerical employee of Carpenters Local #22, against the pension plan of the Carpenters Pension Trust Fund for Northern California and various other defendants. All the defendants, except

the Pension Fund, were dismissed out of the suit prior to trial. This Court has jurisdiction under 29 U.S.C. §§1132(a)(1)(B) and 1132(e)(1).

The background of the suit commences in the winter and spring of 1975; at that time all of the constitutional (elected) officials of the Carpenters Locals were covered by the defendant Pension Plan and contributions to that plan had been made for those officials by their locals since commencement of the plan.

In Southern California, the Carpenters Pension Plan also covered clerical employees as well as elected officials and contributions were made by various locals for the covered clerical help. This disparity of

coverage resulted in some pressure for the Northern California Locals to include their clerical employees who were also covered by their own union pension fund (office and professional employees). On May 20, 1975, the Internal Revenue Service informed various of the Carpenters Locals that the pensions of the constitutional officials might be in jeopardy as the clerical employees were not covered; thus the plan discriminated in favor of the highly paid executive employees.

As a result the defendant Plan adopted Amendment Thirteen (Plaintiff's Exhibit #3), with an effective date of June 1, 1975. This Amendment extended coverage of the defendant Plan to clerical employees such as plaintiff and provided for past service

credits to be given to employees of labor organizations such as plaintiff. Pursuant to Amendment Thirteen, the defendant Fund adopted on August 26, 1975, certain rules and regulations which were mailed to all local unions, district councils and state councils of carpenters on September 19, 1975. (Plaintiff's Exhibit #4). These regulations provided for all union employees to be covered as of June 1, 1975, and contributions by the various labor organizations to the Fund be made as of that date. If any local, district or state group did not make the contributions by December 31, 1975, for all its employees, then future coverage was to be denied for all its employees and officers.

Pursuant to these new regulations, Local 22 made all the necessary contributions to cover all its employees and officers, including plaintiff. During the period of time September 19, 1975, through January 1976, five clerical employees, newly covered under the defendant Plan, applied for and were granted pensions pursuant to the terms of Amendment Thirteen.[1/]

Plaintiff who suffered a nervous breakdown during early fall of 1975, due to increased work load resulting

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1/ In most cases, this meant they obtained life-long pensions varying from $340 to $600 per month for total contributions by their union employers to the defendant Fund of approximately $800-$1,200 (Plaintiff's Exhibits #18-22)

from the retirement of two fellow clerical employees, first sought an early retirement pension on November 13, 1975 (Plaintiff's Exhibit #6). She was subsequently told by Michael Pierce, Supervisor of Pension Services Department of the defendant Fund, that her 12 years 7 months past service did not qualify her for an early retirement pension. However, he did state that if she obtained a Social Security disability pension, she would qualify for a disability retirement pension. Plaintiff subsequently obtained such a pension from the Social Security Administration and an application for a disability retirement pension was processed by Mr. Pierce's department. When plaintiff called Mr. Pierce on February 11, 1976, he advised her that

everything was in order but her pension had to be approved by the pension approval committee, which was automatic.[2/]

On March 16, 1976, plaintiff's application was approved by Mr. Pierce's department (Plaintiff's Exhibit #10) and placed upon the agenda for the March 16, 1976, meeting of the defendant's pension approval committee. (Plaintiff's Exhibit #8).[3/]

2/ Although a supervisor of his department, Mr. Pierce was not a managing agent as he did not have hiring or firing authority over the employees in the department, nor did he have authority to approve pensions. That authority, he stated, was held solely by the Board of Trustees of the Fund.

3/ Plaintiff's name was included in the list of approved pensions. Mr. Pierce said to his recollection, hers was the first name ever included on that list to be rejected by the Committee.

During late winter and early spring of 1975, the Trustees of the defendant Fund began to receive complaints from various carpenters who had been denied pensions about the granting of pensions to the clerical help. The essence of the complaints were:

1. Clerical employees had pensions under their own collective bargaining agreement (OPE) to which the various carpenters locals had contributed;
2. They were getting life-time pensions for a very small contribution to the fund; 4/

4/ The defendaht had been advised by the actuaries prior to its adoption of Amendment Thirteen that the inclusion

3. The clerical employees were being treated better than many carpenters for whom substantial contributions had been made to the fund but not have the required years of service. (sic)

As a result of these complaints, the pension approval committee, on March 16, 1977, voted to defer action on plaintiff's application and recessed the meeting until the full Board of Trustees could reconsider Amendment Thirteen at the March 26 meeting. Plaintiff testified that Mr. Pierce called her after the meeting and advised her that her application had been approved in essence but

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4/ (continued)

of 70 to 80 clerical employees under that Amendment would not jeopardize the fund.

was being held up until the Board of Trustees determined if the fund was going to continue covering clericals.

At the March 26 meeting the Board of Trustees met and passed a resolution rescinding Amendment Thirteen.[5/] Immediately thereafter the pension approval committee reconvened its meeting and voted to deny plaintiff's application for a pension. (Plaintiff's Exhibit #11)[6/]

5/ Amendment Thirteen prior to its rescission had never been submitted to the Internal Revenue Service or the Department of Labor for approval. The rules and regulations promulgated pursuant to Amendment Thirteen were officially rescinded at the May 1976 meeting of the Board of Trustees.

6/ Plaintiff appealed this order but it was denied by the Board of Trustees at its August 1976 meeting.

All contributions made by Local 22 on plaintiff's behalf were refunded by the defendant Fund after rescission of Amendment Thirteen.[7/]

Plaintiff introduced evidence of other union employees who were receiving pensions from or were covered by the defendant Fund. In each instance, however, the carpenters union organization in question had been contributing prior to June 1, 1975, to the pension fund for each employee.

Both parties have stressed the equity of their positions and both have much to talk about; however, this is

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7/ So also were contributions to other locals for their clerical employees; however, the contributions for the five clerical employees whose pensions had been approved were not refunded.

not a case of equities but law.[8/] If the defendant Fund had the power to rescind Amendment Thirteen, then plaintiff's claim must fail as any pension she might receive had to be approved by the Board of Trustees. (Plaintiff's Exhibit #2, page 35, Article IX, Section 2(c)) While Mr. Pierce's office had approved the plaintiff's application, it did so acting under the provisions of Amendment Thirteen. Once that Amendment was rescinded there was no basis for his office to approve such an application. Furthermore, that approval did not vest any right in the plaintiff. Only the Board of Trustees have that power and it was never exercised in

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8/ Prior to trial plaintiff abandoned her claim of estoppel.

plaintiff's behalf.

The defendant Fund for reasons which it deems sufficient determined that the Fund should rescind its action in adopting Amendment Thirteen. The Board of Trustees decision may be reversed only where they are arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or erroneous on a question of law. Rehman v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976); Hicks v. Pacific Maritime Assn. 567 F.2d 355 (9th Cir. 1978). The Court finds none of these elements in this decision by the Fund.[9/]

9/ The Court has not deemed it necessary to make a determination as to whether the initial adoption of Amendment Thirteen was legal; if not, then plaintiff would have no rights at all and if it were

IT IS ORDERED that all of plaintiff's claims for relief be DENIED; that each party bear its own costs and that JUDGMENT be entered by the Clerk in accordance herewith.

This Opinion shall constitute the Findings of Fact and Conclusions of Law pursuant to Rule 54.

The Clerk of the Court is directed to mail copies of this Order to all counsel of record.

SO ORDERED this 4th day of June, 1980.

Richard M. Bilby
United States District
Judge

9/ (Continued)

properly adopted, the Court has now found that it was properly rescinded.

APPENDIX C

FILED
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BRUG, Plaintiff-Appellant, v. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant-Appellee.	No. 80-4321 D.C. No. C-76-2682 WAI ORDER

Appeal from the United States District Court for the Northern District of California

Before: CHOY and HUG, Circuit Judges, and GRAY*, District Judge.

The panel as constituted in the above case has voted to deny the

*The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

petition for rehearing. Judges Choy and Hug have voted to reject the suggestion for a rehearing en banc, and Judge Gray makes no comment with respect to the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

STATUTORY PROVISIONS

29 U.S.C. § 186

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor oganization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor oganization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in Part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable ...

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of

such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; ...

29 U.S.C. § 1104

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.